Anne Traum
<anne_traum@yahoo.com>

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To: Rules_Comments@ao.uscourts.gov
cc:
Subject: Proposed Rule of Appellate Procedure 32.1

03-AP-453

Dear Mr. McCabe,

I represent federal habeas petitioners and federal defendants in direct appeals. I have two primary concerns about proposed Rule 32.1, which would permit litigants to cite to unpublished opinions.

First, prisoner litigants would be at a severe disadvantage under proposed Rule 32.1. As far as I know, unpublished opinions are only available on electronic databases like Westlaw and Lexis. In Nevada, prisoners do not have access to these research services. So Nevada prisoners would be unable to search for unpublished opinions. This inequality of access would put prisoners at an unfair disadvantage. The State of Nevada, or other litigants, could search for and cite to such opinions. A prisoner would only have access to those unpublished decisions provided by opposing counsel, and could not do independent research of unpublished decisions to oppose whatever proposition is being advanced.

Second, I currently rely on unpublished opinions in individual cases to determine whether to petition for rehearing. If proposed Rule 32.1 takes effect, the Ninth Circuit may start issuing one line opinions with no reasoning at all (e.g., simply stating "affirmed" or "dismissed"). This would be unfortunate for practitioners, who use those opinions to determine whether to petition for rehearing. If the court's reasoning is sound, I will discourage my client from petitioning for rehearing. If the court "got it wrong," e.g., because its reasoning is inconsistent with case law, I would consider petitioning for rehearing. If the opinions are reduced to one-liners, it will be difficult to assess whether to seek further review.

For these reasons, I oppose the adoption of proposed Rule 32.1.

Very truly yours,
Anne R. Traum
Assistant Federal Public Defender
Law Offices of the Federal Public Defender
330 S. Third St., Suite 700
Las Vegas, NV 89101
(702) 388-6577